DHARMARAJA

v.

ASIAN CERAMIC SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING MOTION NO: R1-25-12-98]
16 NOVEMBER 1999

LABOUR LAW: *Industrial Court - Decision - Dismissal of employee with just cause and excuse - Absence from work for two days - Whether a breach of contract of employment under s. 15(2) Employment Act 1955 - Whether Industrial Court erred in taking into account absence of 2 days after date of dismissal letter - Whether employee's off day also taken into account - Whether fact that employee returned to work but was refused entry considered - Whether s. 15(2) applicable - Whether certiorari should issue*

LABOUR LAW: *Employment - Absence from work - Whether absence of two consecutive days entitled employer to dismiss employee as of right - Whether surrounding circumstances should be considered - Employment Act 1955, s. 15(2)*

On 27 May 1994, the applicant walked out of the factory premises of the respondent ('company') after a meeting. By a letter dated 28 May 1994, the company sent a letter to the applicant dismissing him. However, upon the instruction of the director of the company, the applicant returned to work on 30 May 1994 but was refused entry into the factory. The Industrial Court held that the applicant was dismissed by the company with just cause and excuse. Hence, the instant application.

The applicant claimed that the chairman of the Industrial Court ('chairman') had misconstrued and misapplied s. 15(2) of the Employment Act 1955 ('the Act') in arriving at his decision.

Held:

[1] In order for s. 15(2) of the Act to apply, the employee must be absent from work for two consecutive working days. The letter by which the applicant was deemed as having dismissed himself was dated 28 May 1994. At that date 2 consecutive days had not passed. It must be noted that the chairman did observe that the applicant admitted that he had returned to work on 30 May 1994 but was refused entry into the factory.

The chairman took into account 29th and 30th as consecutive days but these dates were after the date of the dismissal letter. Further, 29th was not a working day as it was a Sunday, the applicant's day off.

[2] The company failed to prove continuous absence of 2 working days. The chairman clearly misapplied s. 15(2) of the Act. He failed to take into account a very relevant fact, *ie*, that at the time of the purported dismissal there were no 2 consecutive days of absence.

[3] An absence of 2 consecutive days does not mean that the contract of employment comes to an end automatically nor does it entitle the company to dismiss an employee as of right. The circumstances surrounding the absence must first be considered.

[Application allowed.]

Case(s) referred to:
Asian Ceramic Sdn Bhd v. Dharmaraja [1997] 3 ILR 1091 ***(refd)***
Gim Aik Estate Sdn Bhd Malacca v. National Union of Plantation Workers (Jan – June 1982) MLLR 117 ***(refd)***

Legislation referred to:
Employment Act 1955, s. 15(2)
Employment Ordinance 1955, s. 15

For the applicant - S Shanker; M/s P Kuppusamy & Co
For the respondent - Atma Singh Veriah; M/s Atma Singh Veriah & Co

Reported by Usha Thiagarajah

JUDGMENT

KC Vohrah J:

Decision

I am allowing the application for an order of *certiorari* to issue to quash Industrial Court *Asian Ceramic Sdn Bhd v. Dharmaraja* [1997] 3 ILR 1091 dated 24 December 1997. The matter is remitted to the Industrial Court to be heard by another chairman.

I rest my decision principally on the ground that the chairman of the Industrial Court had misconstrued and in fact wrongly applied s. 15(2) of the Employment Act 1955 in arriving at the decision that the claimant had breached his contract of employment with the company, the respondent in this matter.

It is appropriate to set out the letter dated 28 May 1994 sent by the company to the claimant. What is to be noted is that there was a meeting held by COW1 with the claimant and a few other kiln operators. This was on 27 May 1994. The meeting resulted in the claimant leaving the meeting and then leaving the factory premises. The claimant returned to work on 30 May 1994 at 3 pm but was not allowed entry into the factory.

I go back to the letter that was issued on 28 May 1994 just **one day** after the claimant left the premises which reads as follows:

ASIAN CERAMIC SDN. BHD
25, JALAN PERUSAHAAN 2,
KAWASAN PERUSAHAAN BERANANG
43700 BERANANG, SELANGOR DARUL
EHSAN, MALAYSIA
TEL: 03-8167615,
8167652 FAX: 03-9167650

28 May 1994
Dharmaraja @ Abdul Malik
a/l Abdul Wahab
C5-10 Tingkat 5, Jalan Asa 9
Taman Asa Jaya
43000 Kajang
Selangor Darul Ehsan

Dear Sir,

In the last 4 weeks or so, I have had at least 6 meetings with you together Mr. Abul and Mr. Bala to discuss about the operation of Shuttle Kilns, which of late seemed to be inconsistent as far as temperature control was concerned, thereby adversely affect the quality of the fired ovenware.

In the last one week, *ie*, for the period 19 May to 25 May 1994, at least 4 cars of ovenwares from the Shuttle Kilns were substantially damaged due to poor firing control and too high temperature.

On the morning of 27 May 1994, I called for a meeting in which you, Abul, Bala and 4 kiln operators were present. I had explained to all concerned that from the buller rings which we put into the furnace, the temperatures in the furnace had sometimes reached 1300 degrees centigrade. The maximum firing temperature should be only 1200 degrees centigrade. No wonder we were getting distortions of ovenwares like before. I had also, pointed out that the Company had suffered a loss of about $4000 in the last one week. It has also been ascertained that the 2nd shift workers had been sleeping regularly. For example, on 23 May, 3 out 4 workers were sleeping from 0230 hours to 0500 hours.

> *After the meeting which ended at about 10.30 am. I was informed that you had left the factory together with all the 5 kiln operators without informing anybody*. You had also threatened the Guard on duty. By your action, you had deliberately trying to sabotage the operation of the factory.
>
> Under the above circumstances, *it is deemed that you had dismissed yourself from the service with the Company according to the labour laws*. With immediate effect you are being declared as *'persona non grata'* to this factory. This means that you not permitted to enter the factory at all. Also, according to the labour laws, you should pay back one month salary to the company since you just walked out from your job without giving any notice. Therefore your salary for the month of May 1994 will be retained by the Company.
>
> Yours sincerely,
>
> Sgd. xxx (emphasis added)

In the context of this letter it is relevant to point out that in reply to the statement of claim of the claimant that his dismissal was without just cause or excuse and effected in violation of the principles of natural justice and that it was tainted with *mala fides*, the company denied dismissing the claimant and stated that the claimant by walking out without the approval of the company or without good reason had by "his own conduct" terminated his employment. Further it was stated that he had absented himself and "had by his own conduct terminated his employment without notice."

The company relied on s. 15(2) of the Employment Act to argue that the claimant had breached his contract of employment.

Section 15(2) reads as follows:

> An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

This is what the chairman of the Industrial Court said in respect of s. 15(2) in the context of his finding of facts:

> The word consecutive has been defined in *Oxford Dictionary of Current English* – New Edition (2nd Edition) as following continuously in unbroken or logical order. In the instant case the claimant's absence can be said to be continuous. The claimant was absent for more than two days. He was absent for more than two days without prior leave of the company and without reasonable excuse and without informing or attempting to inform his employer. On the ground I

find the claimant had breached his contract of employment with the Company. No reasonable employer is expected to wait indefinitely for the employee to return to work. The statute has made the position clear to both parties. I therefore hold the dismissal of the Claimant was with just cause or excuse.

I agree with the submission of learned counsel for the claimant that the chairman erred in applying s. 15(2). As was pointed out firstly, in order for s. 15(2) to apply, the employee must be absent from work for two continuous working days. In the present case the letter by which the claimant was deemed as having dismissed himself was dated 28 May 1994. At that date two continuous days had not passed. It must be noted that the chairman observed that the claimant had admitted that he returned on 30th but was refused entry into the factory and he took into account the 29th and 30th as consecutive days. But these dates were after the date of the "dismissal" letter. At the time of the letter, there were no two consecutive days of absence.

The second point made, with which I also agree, is that it is clear that the chairman wrongly took into account the 29th as being a working day when the 29th was a Sunday, the claimant's day off. There was evidence to that effect.

What has to be noted is that the company failed to prove continuous absence of two working days. The chairman clearly misapplied s. 15(2) of the Employment Act. He failed to take into account a very relevant fact, *ie*, that at the time of purported dismissal there had been no absence of two continuous working days.

There was another argument made by the counsel for the claimant, the third point, that even if there was absence of two continuous working days, s. 15(2) does not entitle the company to deem the employee as having terminated the contract of service. Here it must be remembered that in their pleadings the company denied dismissing the claimant. Instead the company claimed that the claimant had himself terminated the employment. Counsel has relied on the case of *Gim Aik Estate Sdn Bhd Malacca v. National Union of Plantation Workers* (Jan – June 1982) MLLR 117 (Award No. 5582), where his Lordship Harun Hashim J (as he then was) then sitting as the President of the Industrial Court gave his decision which commends itself for the clarity in principles. His Lordship dealt with s. 15 of the Employment Ordinance 1955 applicable at the material time:

Section 15 of the Employment Ordinance, 1955 reads:

(1) An employer shall be deemed to have broken his contract of service with the employee if he fails to pay wages in accordance with Part 111.

(2) An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two days –

(a) without prior leave from his employer or without reasonable excuse; or

(b) without informing or attempting to inform his employer of the excuse prior to or at the earliest opportunity during such absence.

It is said that the court held that where an employee has been continuously absent from work more than two days in the circumstances described in s. 15(2) of the Employment Ordinance (the Ordinance), the employer may automatically terminate the employment. We find that the court made no specific reference to s. 15(2) of the Ordinance. We also find that there is no such thing as statutory termination. Breach of contract of services and termination of employment are two different things. A breach of contract of service may or may not lead to termination of employment. Section 15 of the Ordinance is only a deeming provision. It cannot be the intention of the legislature that employees automatically lose their jobs whenever an employer fails to pay their wages. Nor do we foresee employees terminating their contracts of service every time an employer delays paying their wages for more than seven days after the due date. In such instances, the employer commits an offence and may be dealt with under s. 91 of the Ordinance.

Unlike the employer, there is no penalty clause in the Ordinance against the employee if he breaches his contract of service. The consequence of any such breach is dependent on the conditions of employment and the provisions of the ordinance. Absence without prior leave for more than two days (as in the instant case) is deemed to be a breach of the contract of service by s. 15(2) of the Ordinance. If the circumstances of the breach are such that it justifies termination of service, then the employer may terminate the contract of service under s. 13(2) of the Ordinance, which provides:

> Either party to a contract of service may terminate such a contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of services.

In our case the company had denied dismissing the claimant and have stated the claimant had by his own conduct terminated his employment.

If there is an absence of two consecutive days that does not mean that the contract of employment comes to an end automatically nor does it entitle the company to dismiss an employee as of right. The circumstances surrounding the absence must first be considered. In the instant case, there has not even

been a breach of contract under s. 15(2) as there has been no absence for more than two consecutive working days.

I think what I have stated so far on the 1st ground in this application *ie*, the chairman had misconstrued and misapplied s. 15(2) of the Employment Act in arriving at his decision that the claimant had breached his contract of employment with the company, is sufficient for an order of *certiorari* to issue.

In passing I wish to state I find merit with three other grounds namely –

1) the 2nd ground, that the court had arrived at its decision that was baseless and unreasonable when it decided that the claimant did not attend work for more than two working days;

2) the 3rd ground, that the court arrived at a decision that was baseless and unreasonable when it held that the claimant did not attend work on 29 May 1994 when the day was a Sunday and a rest day for the claimant;

3) the 4th ground, that the court failed to take into account that the claimant was contacted by the company's director, Mr. Lim, who directed the claimant to return to work at 3 pm on 30 May 1994 and that the claimant followed the instruction.

In the circumstances *certiorari* is to issue to quash Industrial Court Award No. 604 of 1997 dated 24 December 1997 and the matter is remitted to the Industrial Court to be heard by another chairman. Costs to the claimant.